

Statement of
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Committee on the Judiciary
United States Senate

The President's Request to Extend the Service of Director Robert Mueller of the FBI
Until 2013

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The Committee has asked for my views regarding the constitutionality of a statutory extension of the term of the current Director of the Federal Bureau of Investigation (FBI), an extension that would involve no new nomination and appointment. A bill providing for such an extension, S. 1103, has been introduced, and I will use it as an example of the kind of legislation under consideration.

I believe that a statute like S. 1103 would be inconsistent with the Constitution because it would seek to exercise through legislation the power to appoint an officer of the United States, a power that may be exercised only by the President, a head of department, or a court of law.

Under current law, the Director of the FBI is appointed by the President with the advice and consent of the Senate to a ten-year term. See 28 U.S.C. 532 note. The statute provides that a Director is not eligible for reappointment. The ten-year term of the current Director is nearing its end. S.1103 would extend that term for another two years, without a new nomination and confirmation.

The Appointments Clause of Article II of the Constitution provides that the President “shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.” It goes on to provide that “the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of department.” U.S. Const., Art. II, sec. 2, para. 2. Although the point is not essential to my conclusion, I will assume that the office of Director of the FBI is a superior or principal office, not an inferior office, so that only the President may nominate and appoint to it.

As the Appointments Clause assumes, Congress has substantial power to create offices and prescribe their powers, duties, and terms. The statute creating the office of Director of the FBI is an exercise of that power. While many officers serve at the pleasure of the President, and thus indefinitely, others, like the Director, serve for a specified term of years.

Despite Congress’ power with respect to offices, it may not designate who is to hold them through legislation. “The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause.” *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). The reasoning underlying this well-established principle is that the Appointments Clause, which deals specifically with the selection of officers, is a specific provision that limits the more general grant of power to Congress regarding offices.

The Supreme Court has implicitly recognized the distinction between permissible exercises of congressional authority with respect to offices and impermissible congressional appointments. In 1890 Congress by statute provided for the creation of Rock Creek Park in the District of Columbia, and created a commission to select the land that would comprise it. *Shoemaker v. United States*, 147 U.S. 282 (1893). The commission consisted of the Chief of Engineers of the Army, the Engineer Commissioner of the District of Columbia, and three

individuals appointed by the President with the advice and consent of the Senate. *Id.* at 284. Private owners whose property the commission proposed to take with the power of eminent domain raised a number of constitutional objections to the commission's proceedings, one of which was that the provision designating the Chief of Engineers and the Engineer Commissioner was invalid because "while Congress may create an office, it cannot appoint the officer." *Id.* at 300.

The Court responded that the Chief of Engineers and the Engineer Commissioner at the time the statute passed were already "officers of the United States who had been theretofore appointed by the President and confirmed by the Senate," *id.* at 301. The Court went on, "we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate." *Id.* While recognizing that Congress may change the powers and duties of an office without thereby creating a new office requiring a new appointment, the Court indicated that the addition of new duties not germane to those already in place could constitute a new office for which a new appointment would be necessary. If Congress' power to change the content of an office could never run afoul of the Appointments Clause, germaneness would not be required. But if there is a constitutionally significant difference between changing an existing office and making a new one, the line between what is germane and what is not is a reasonable place to locate that difference.

The Court recently confirmed this understanding of *Shoemaker*. "In *Shoemaker*, Congress assigned new duties to two existing offices, each of which was held by a single officer. This no doubt prompted the Court's description of the argument as being that 'while Congress may create an office, it cannot appoint the officer.' By looking to whether the additional duties assigned to the offices were 'germane,' the Court sought to ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office." *Weiss v. United States*, 510 U.S. 163, 174 (1994).

Insofar as an act of Congress constitutes an appointment, it is thus inconsistent with the Constitution. An appointment is a legal act that causes someone to hold an office that otherwise would be vacant or held by someone else. A statutory extension of the term of an incumbent causes the current incumbent to hold an office that otherwise would be vacant upon the expiration of the incumbent's term. It is thus a statutory appointment, just as is a change in the powers and duties of an office so substantial as to make it a new one. It is just like a statute that provides that a named person is hereby appointed to a specified office.

For some constitutional interpreters, this fact alone is enough to make legislation like S. 1103 inconsistent with the Constitution, without any further inquiry into constitutional purpose. Inquiry into purpose in fact reinforces the conclusion, because legislative appointments, including legislative extensions, are inconsistent with a fundamental constitutional principle that underlies the Appointments Clause in particular: with power comes responsibility.

The President alone nominates superior officers, and the President alone appoints them. The Senate must give its advice and consent, but cannot itself make a nomination, nor indeed can it complete the process; even when the Senate has consented, the President retains the discretion

whether finally to make the appointment. With respect to superior officers, as with treaties but not with laws, the President thus has what amounts to an absolute veto. He thus has absolute responsibility, and can be held to account for a bad nomination or appointment, with no possibility of blaming some other participant in the process.

By contrast, laws have many parents. They need not, and routinely do not, originate with the President, whose formal involvement in the legislative process occurs only at the beginning, if he recommends legislation, and at the end, when it is presented to him. The President may sign a statute, parts of which he dislikes, in order to obtain the parts he supports. Because so many participate in the law-making process, and the President's veto is not absolute, his responsibility for any part is diffused, as the law's objectionable features can be attributed to someone else. If statutes could include appointments, there could be appointments for which the President was not fully and personally responsible.

This difference between appointments and acts of Congress appears on the face of the Constitution, and the rationale for it that I suggest is as old as the document itself. Alexander Hamilton, in *The Federalist*, argued that with respect to appointments "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." *The Federalist* No. 76, at 510-511 (Jacob Cooke ed., 1961). Dilution of the President's sole responsibility for nomination and appointment is inconsistent with constitutional principles.

The Senate of course has a central role in appointments of superior officers, for which its advice and consent is required. That role imposes a responsibility on the Senate too, a responsibility reflected in the process it has created for the careful scrutiny of appointments. The legislative process, which involves the House of Representatives, is distinct, and does not produce the accountability for the Senate as an institution and for individual Senators that confirmation does.

As the foregoing suggests, with respect to legislation like S. 1103 interference with the President's power is not the only, and perhaps not the main, source of constitutional difficulty, because focusing solely on power leaves out accountability. Interference with the President's power, though, is itself also inconsistent with constitutional principles. Focusing on that aspect of the problem, Assistant Attorney for the Office of Legal Counsel Walter Dellinger concluded in a 1994 opinion that legislative extensions of officers' terms are permissible when the officer in question may be removed at the President's pleasure. Memorandum for the Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute (April 5, 1994). The opinion reasons that although the Constitution is designed "to deny to the legislature the power to select the individuals who exercise significant governing authority," *id.* at 6, a legislative appointment of an officer the President may freely remove is "constitutionally harmless," *id.*, because the President may exercise his appointment power after removing the person appointed by Congress.

The President's ability to undo a congressional appointment, however, does not keep an appointment from happening, much as the availability of a remedy does not negate the occurrence of a wrong. Whether or not the President can do anything about it, a person appointed by statute will have been appointed by statute, which the Constitution does not contemplate.

Moreover, the argument proceeds from an incorrect premise: that for practical purposes the power to remove is the same as the power not to nominate or appoint. But they are different, and in many circumstances the former is in practice less useful to the President than the latter. Removing an incumbent is often politically more controversial than declining to reappoint one, a fact sometimes manifest with respect to United States Attorneys, who serve for a term of years but may be removed by the President at any time. For that reason, a statutory appointment combined with a presidential power to remove can be a practical restriction of the President's ability to choose the person who will hold an office. The fact that in any particular case, such as this one, the President may support an extension for the individual involved does not obviate that difficulty. In this matter the Constitution operates through rules designed to cover a wide range of cases which cannot be sorted out one at a time. At the level of rules, the question is not whether congressional appointment always limits the President's discretion in choosing officers, but whether it can sometimes. Because it can, it is not the practical equivalent of the process set out in the Appointments Clause, and so is not consistent with the Constitution.

Support for the constitutionality of a statute like S. 1103 can be found in the Ninth Circuit's decision in *In re Benny*, which upheld statutory extensions of the terms of bankruptcy judges appointed under the Bankruptcy Reform Act of 1978, and in cases following it. In *re Benny*, 812 F. 2d 1133 (9th Cir. 1987). The extension statutes were temporary measures adopted in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which a majority of the Justices concluded that the 1978 act had granted non-life-tenured bankruptcy judges authority that could be exercised only by the life-tenured judges of the Article III courts. A majority of the court of appeals in *Benny* rejected a constitutional challenge to the extensions of term. Judge Norris concurred in the judgment, finding that the term extensions were unconstitutional under the Appointments Clause, but that the bankruptcy judge whose decision was at issue in the case could continue to serve under the hold-over component of his original appointment.¹

While *Benny* upheld statutory extensions of terms, its persuasive force is limited, as the sources on which it relies do not truly support its conclusion. The court of appeals stated that, "The Supreme Court has implied that Congress may prospectively alter terms of officers without running afoul of the Appointments Clause," 812 F. 2d at 1141, citing *Wiener v. United States*, 357 U.S. 349 (1958). That inference is highly tenuous. *Wiener* involved a constitutional challenge to President Eisenhower's removal of a judge of the War Claims Commission. The legislation creating the commission originally provided that the agency would terminate three

¹ "My principal disagreement with the majority's position is that I believe the Appointments Clause precludes Congress from extending the terms of incumbent officeholders. I am simply unable to see any principled distinction between congressional extensions of the terms of incumbents and more traditional forms of congressional appointments." 812 F. 2d at 1142-1143 (Norris, J., concurring in the judgment) (footnote omitted).

years after the expiration of the time for filing claims, 357 U.S. at 350; the filing date was twice extended, once to March 31, 1951, then to March 31, 1952, and the commission's own expiration date was extended along with it, *id.* The Supreme Court addressed the President's removal authority, and concluded that the statute permissibly protected a quasi-judicial officer like Wiener from removal at the President's pleasure, *id.* at 356. The Court did not pass on the constitutionality of Congress' decision to continue the commission's existence beyond its originally scheduled sunset date.

Even if *Wiener* is read as implicitly approving that congressional decision, it does not imply that legislation like S. 1103 is permissible. The statutes prolonging the existence of the War Claims Commission did not extend the term of an officer who otherwise would have been replaced by a new appointee because the officer's term had expired. Rather, they extended the statutory life of an agency, and the service of the agency's members along with it. Members of the commission continued to serve under their original appointments. Those appointments were not for a term of years like that of the Director of the FBI, but were tied to the existence of the commission itself.²

The court in *Benny* also reasoned that "Congress' power to extend prospectively terms of office can be implied from its power to add to the duties of an officer other duties that are germane to its original duties," 812 F. 2d at 1141, relying on *Shoemaker*. As noted above, the Court in *Shoemaker* distinguished between germane and non-germane duties in order to distinguish permissible changes in an office from the creation of a new office that would require a new appointment. That case did not involve an extension of an incumbent's term. When new and germane duties are added, the same individual holds the same office for the same term. That fact does not imply that a term extension that causes someone to hold an office he otherwise would cease to hold is not an appointment to the new period.

A court that followed *Benny* might nevertheless find the bankruptcy extension statutes that it addressed importantly different from legislation like S. 1103. The acts at issue in *Benny* applied to all of the country's bankruptcy judges. An extension of the current FBI Director's term would apply to him alone. Because nomination and appointment are particularized acts involving specific individuals, the extension of a single individual's term by statute is more like an appointment than is the extension of the terms of dozens of officers. Indeed, the Supreme Court in *Weiss* indicated that there is a distinction for Appointments Clause purposes between general and individualized statutes. 510 U.S. at 174.

² The same is true of early congressional treatment of the Post Office, on which *Benny* also relied, 812 F. 2d at 1141-1142. Before it comprehensively legislated with respect to the Post Office, Congress enacted temporary legislation authorizing the President to appoint a Postmaster General who would, under the President's direction, continue the postal system established under the Articles of Confederation. Act of September 22, 1789, ch. xvi, 1 Stat. 70. That act provided that it would expire at the end of the next session of Congress. *Id.* Congress twice extended that date, once to the end of the next session of Congress as of August, 1790, Act of August 4, 1790, ch. xxxvi, 1 Stat. 178, then to the end of the next session as of March, 1791, Act of March 3, 1791, ch. xxiii, 1 Stat. 218. As with the War Claims Commission, Congress, by extending the life of an agency, was not extending the term of an officer who otherwise would have ceased to serve to be replaced by a new appointment. Instead, it made it possible for the appointee to continue to serve pursuant to his original appointment. Unlike the Director of the FBI, the first Postmaster General served indefinitely, not for a specified term of years.

In this connection, it is important to bear in mind that the although the courts do not lightly find that acts of Congress are unconstitutional, in the past they have enforced the Appointments Clause by holding invalid the actions of purported officers whose appointments did not comport with it. *Buckley* is an example, as is *Ryder v. United States*, 515 U.S. 177 (1995). *Ryder*, an enlisted member of the Coast Guard, was convicted of several drug-related offenses by a court martial, and appealed that conviction to the Coast Guard Court of Military Review. Two of the judges on that court's three-judge panel were civilians appointed to serve by the General Counsel of the Department of Transportation. Because the General Counsel is not a Head of Department and civilians hold no military commission from the President that can empower them to act as military judges, the appointments were inconsistent with the Appointments Clause. 515 U.S. at 179-180. The Supreme Court rejected the argument that the Court of Military Review's decision should be left undisturbed under the so-called de facto officer doctrine, and concluded that *Ryder* was "entitled to a hearing before a properly appointed panel of that court." *Id.* at 188. In a properly presented case involving an individual subject to a purported exercise of government power by the Director of the FBI serving pursuant to a statute like S. 1103, a court thus could find that exercise of power to be invalid, either prospectively as in *Buckley* or retrospectively as in *Ryder*.

A statute like S. 1103 would not be consistent with the Constitution. If Congress wishes to make it possible for the current Director of the FBI to serve for an additional two years, but not for a new ten-year term, I believe it could do so by statute. It could provide a relatively brief period of time, beginning on the date of enactment of a new statute, during which the President could nominate someone to serve as Director of the FBI for two and not ten years, and could relieve such a nominee of any existing statutory term limit.³ The President could nominate the current Director to that term, the Senate could confirm him, the President could appoint him, and the statute then could expire, so that the next appointment would be to a ten-year term.

My testimony addresses legal questions, and does not reflect any objection on my part, as a policy matter, to an extension of the term of the current Director of the FBI. It was prepared as a public service and reflects my own views. It is not presented on behalf of and does not represent the views of any client or my employer, the University of Virginia.

³ I will not comment on the constitutionality of the current statutory limit on reappointment of the FBI Director.